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No. 82-2127

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM A. MERTSCHING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision below affirming the dismissal of his tax refund suit for failure to comply with the district court's discovery order.

1. Petitioner is an income tax return preparer as defined by Section 7701(a)(36) of the Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)). Section 6694(a) of the 1954 Code provides that "[i]f any part of any understatement of liability with respect to any return * * * is due to the negligent or intentional disregard of rules and regulations by any person who is an income tax return preparer * * *, such person shall pay a penalty of $100 with respect to such return * * *." In December 1980, petitioner was assessed two $100 penalties by the Internal Revenue Service (IRS) under Section 6694(a) of the 1954 Code. The penalties were imposed because petitioner prepared returns for persons claiming to have assigned their incomes to third persons by

means of so-called "family equity trusts." Those arrangements uniformly have been held to be ineffective for federal tax purposes.[1] Following the procedures set forth in Section 6694(c) of the 1954 Code, petitioner paid 15% of the assessed penalties and filed the instant refund action (Pet. App. A3-A4).

On June 15, 1982, the government served a notice of deposition upon petitioner. Petitioner filed a motion to quash, contending that Section 6694 was facially unconstitutional and that the compelled answer to any questions concerning his activities would violate his Fifth Amendment right against self-incrimination. Thereafter, the government filed a motion to compel discovery. After a hearing, the district court granted the motion and advised petitioner that his case would be dismissed if he did not appear and respond to questions during the deposition (Pet. App. A4-A5).

Despite the admonition, petitioner refused to answer any questions during the rescheduled deposition, including questions concerning his occupation and business address. Consequently, the government moved to dismiss the suit for failure to comply with the district court's discovery order. The district court again conducted a hearing during which petitioner asserted that he could not be compelled to be a witness against himself. The district court then dismissed the case with prejudice (Pet. App. A5). The court of appeals affirmed, holding that the district court did not abuse its discretion in imposing the dismissal sanction pursuant to Fed. R. Civ. P. 37(b)(2)(C) (Pet. App. A1-A8).

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[1]See, *e.g.*, *Schulz* v. *Commissioner*, 686 F.2d 490 (7th Cir. 1982); *Gran* v. *Commissioner*, 664 F.2d 199 (8th Cir. 1981); *Markosian* v. *Commissioner*, 73 T.C. 1235 (1980).

2. Petitioner apparently contends (Pet. 3-7) that dismissal was improper here because his failure to comply with discovery was grounded on the assertion of the Fifth Amendment privilege against self-incrimination. As the court of appeals held, however, there was no basis here for invoking the Fifth Amendment.

The privilege against self-incrimination may be asserted in a civil proceeding (see, *e.g.*, *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973)), but it may be asserted only with respect to a substantial apprehension of threatened criminal sanctions. Thus, if the claimant's apprehension arises from the imposition of sanctions that are remedial and civil in nature, the privilege is not available. See *Johnston* v. *Herschler*, 669 F.2d 617, 619 (10th Cir. 1982); *Devine* v. *Goodstein*, 680 F.2d 243, 246-247 (D.C. Cir. 1982); see also *Lefkowitz* v. *Turley, supra*, 414 U.S. at 77, 84.

Petitioner's argument that the penalty of Section 6694(a) is in the nature of a criminal sanction, and hence that he was entitled to invoke the Fifth Amendment to avoid exposing himself to that penalty, is without merit. Whether a penalty is civil or criminal is a matter of statutory construction. The initial inquiry focuses upon whether Congress has expressly or impliedly indicated a preference for one or the other. Further, assuming an intention to create a civil penalty, it must be determined if the statutory scheme is so punitive as to override that intention. *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980).

Section 6694(a) was added to the 1954 Code as part of the Tax Reform Act of 1976, Pub. L. No. 94-455, Section 1203(b)(1), 90 Stat. 1687, to curb the number of inaccurate tax returns filed through paid tax return preparers. Staff of the Joint Committee on Taxation, 94th Cong., 2d Sess., *General Explanation of the Tax Reform Act of 1976*, 346, *reprinted in* [2] 1976-3 Cum. Bull. 358. Section 6694(a) "is

* * * to be interpreted in a manner similar to the interpretation given the provision under present law (sec. 6653(a)) relating to the disregard of rules and regulations by taxpayers on their own returns." *General Explanation of the Tax Reform Act of 1976, supra*, at 351, *reprinted in* [2] 1976-3 Cum. Bull. 363.

It is settled that the penalty provision of Section 6653(b) of the 1954 Code providing for a 50% addition to tax for fraud is a civil penalty. *Helvering* v. *Mitchell*, 303 U.S. 391, 401-404 (1938). If Section 6653(b), which prescribes more stringent penalties than Section 6653(a), is civil in nature, it is clear that Section 6653(a) must also be considered civil in nature. Hence, Congress' reference to Section 6653(a) in discussing Section 6694(a) indicates that the latter section is intended to be considered a civil remedy. And the extraction of a $100 penalty for each negligently prepared return manifestly is not so punitive as to override that intention. Because the Fifth Amendment privilege does not apply with respect to the imposition of civil sanctions, there was no basis for petitioner to invoke it when the government sought to depose him.[2]

Similarly, contrary to petitioner's apparent contention (Pet. 4), the Section 6694(a) penalty does not constitute the type of forfeiture that is considered criminal under *Boyd* v. *United States*, 116 U.S. 616, 634 (1886). In order for the Fifth Amendment privilege to extend to civil forfeiture proceedings, the statute involved must contemplate imposing a penalty only upon those significantly involved in a

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[2]Even if we assume the sanctions involved were criminal in nature, petitioner's blanket assertion of the privilege was unwarranted. The determination of the merit of claims of privilege is for the trial court, and therefore the privilege can properly be claimed only on a question by question basis. Thus, a blanket claim of privilege cannot be countenanced. See *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951); *United States* v. *Sullivan*, 274 U.S. 259, 263-264 (1927); *United States* v. *Davis*, 636 F.2d 1028, 1038 (5th Cir. 1981).

criminal enterprise. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 688 (1974); *United States* v. *United States Coin & Currency*, 401 U.S. 715, 721-722 (1971). Thus, if the forfeiture penalty is closely tied to or the equivalent of a criminal sanction, it is arguable that the Fifth Amendment privilege is available. Here, however, the penalty assessed against petitioner arises from the preparation of tax returns and is purely remedial. Its imposition obviously is not in the nature of a criminal forfeiture. See, *e.g.*, *Plunkett* v. *Commissioner*, 465 F.2d 299, 303 (7th Cir. 1972). In sum, the court of appeals clearly was correct in holding that the district court did not abuse its discretion in imposing the dismissal sanction. See, *e.g.*, *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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